IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TOBY RAFAEL CHRISTIAN AKA TOBY R. CAMPBELL, Appellant.	)	No. 61114-3-I DIVISION ONE UNPUBLISHED OPINION FILED: July 13, 2009

Appelwick, J. — A jury found Christian guilty of third degree assault by battery. Before trial, he asserted an equal protection claim on behalf of felons in King County who were excluded from the jury venire because they were too poor to pay their legal financial obligations, preventing restoration of their civil rights. Christian argues that his Sixth Amendment right was violated, because the jury did not represent a fair cross-section of the community. He argues that the instruction for third degree assault, as articulated in WPIC 35.50 and as given at trial, improperly defined the intent element of assault by battery. He also appeals the trial court's decision to exclude testimony under ER 404(a) and ER 405. Finding no error, we affirm.

FACTS

On September 15, 2006, Toby Christian, AKA Toby Campbell, took his daughter, A.C., to Memorial Stadium, in Seattle, Washington, for the Garfield-Franklin high school football game. Officers Daina Boggs, David Blackmer, and Brian Lundin were assigned to direct traffic exiting and entering the parking lot. When the game was over, A.C. and her friend A.H. found Christian, who was going to drive them home. The girls returned to the car ahead of Christian, walking down the middle of one of the parking lot lanes. After the girls ignored the officers' requests to move out of the way, Officer Blackmer grabbed them by their backpacks and took them over to the SPD vehicle to ask them for identification. Later, A.H. was able to run away to get Christian.

The parties' accounts of the facts after this point diverge. According to Officer Boggs, Christian ran up to her, she put her hands up, and Christian pushed her without provocation. He then somehow ended up behind her, with Christian pinning her arms. She called for back up. Officer Blackmer arrived and shot Christian with a stun gun. Officer Boggs was able to get out from underneath Christian, although she does not remember how they ended up on the ground.

Christian testified that A.H. came to tell him that police had his daughter. He began to run, led by A.H., toward where police were detaining A.C. When he saw two officers, he slowed down. His intention was to inform the officers that he—the father—was there to deal with any issues that may arise. Officer Boggs asked him what he was doing, to which he replied, "[t]hat's my daughter." She

told Christian that he could not go to where A.C. was, and it appeared to Christian that Officer Boggs began to reach for her flashlight. Christian put his hands up, anticipating a hit. He heard Officer Boggs radio that she was under assault, and then shortly thereafter, she struck Christian with the flashlight in the eye. In a quick succession of events, officers tackled Christian, he received what felt like several kicks to the head, and Officer Blackmer shot him with a stun gun.

The State charged Christian with third degree assault for his interaction with Officer Boggs. A jury convicted Christian as charged, and he received a standard range sentence of 32 days, with 30 days converted to community service.

DISCUSSION

I. Equal Protection

Prior to trial, Christian asserted an equal protection claim on behalf of the would-be jurors, who had been excluded from the venire based on their inability to pay their legal financial obligations (LFOs) [1] and restore their rights. The trial court found that Christian had third-party standing to assert the claim.[2] The trial

[1] LFOs include court costs, fees, and victim restitution. RCW 9.94A.030(31).

[2] As a defendant asserting third-party standing, Campbell had to demonstrate that: "(1) the defendant suffered an 'injury in fact'; (2) he had a 'close relationship' to the excluded jurors; and (3) there was some hindrance to the excluded jurors asserting their own rights." Campbell v. Louisiana, 523 U.S. 392, 397, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998) (quoting Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). The State, in its brief of respondent, alleges a cross-appeal/cross assignment of error, and argues that Campbell does not have third-party standing to raise the would-be juror's equal protection claims. Campbell moved to strike the cross-appeal/cross assignment of error in his reply brief, as the State did not file a notice of cross-appeal. Campbell is correct in noting that the State did not comply with RAP 5.1(d), requiring that "[a] party seeking cross review must file a notice of appeal or a notice for discretionary review . . . ." Thus, we grant the motion and hold the issue is not properly before this court.

court ruled that, on the merits, the would-be jurors' equal protection claim failed, because Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007), controlled.

In Madison, three felons unable to pay their LFOs alleged that Washington's disenfranchisement scheme violated the state and federal equal protection clauses, because it denied them their right to vote based on wealth. Id. at 87–88. The court in Madison held that "Washington's disenfranchisement scheme does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, because it is rationally related to legitimate state interests."[3] Id. at 109. Madison prevents consideration of a challenge to the civil rights restoration statute without also considering it a challenge to the disenfranchisement scheme. See id. at 104–05, 106 n.12. Christian concedes that Madison rests on identical factual and legal issues to those presented, and that it therefore controls this court's decision. We accept this concession. Christian's challenge fails.

II. Sixth Amendment Fair Cross-Section

This court reviews issues of constitutional interpretation de novo. Id. at 92.

Cambell alleges his Sixth Amendment right to an impartial jury has been violated. Christian challenges the statutory disqualification of persons with felony convictions under RCW 2.36.070(5).[4] He argues that the cumulative

[3] The challenge in Madison was to *both* the civil rights statute and to the disenfranchisement scheme. 161 Wn.2d at 90. Washington's disenfranchisement law is set out in article VI, section 3 of the state constitution, and says only that all persons convicted of infamous crimes unless restored to their civil rights are excluded from the elective franchise.

[4] Campbell does not challenge the statutory scheme that creates the jury lists. Any such challenge would have failed immediately, as "Washington's method of creating a jury list is

effect of the disqualification provision and the racial bias in the production of felony convictions in King County is "to allow a deductive conclusion that, assuming all else in the operation of GR 18 is random and race-neutral . . . the group summonsed to jury duty under that rule must under-represent people of color and black citizens in particular."[5]

The Sixth Amendment right to an impartial jury includes the requirement that the jury be drawn from a fair cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 527, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). "Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. at 538 (citations omitted).

To establish a prima facie violation of the fair cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

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broader and more inclusive than required by law." State v. Cienfuegos, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001).

[5] Citing State v. Hilliard, 89 Wn.2d 430, 440-41, 573 P.2d 22 (1977), the State asserts that Campbell's claim must fail because he has not presented evidence about the *actual* jury master list, jury source list, jury pool, or jury venire. The State's reliance on Hilliard for this proposition is misplaced; rather, the court denied Hilliard's fair cross-section claim because he had not shown *any* evidence concerning the representation of racial minorities on King County voter registration lists. Id. at 441. Campbell is not required to address the actual composition of his jury, but rather the racial composition of the pool. Further, it is not feasible to calculate the actual racial composition of the jury pool or venire because the King County jury manager has no information identifying race. Campbell has presented social science data on the racial composition of the pool, the only possible data available to present to the court.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).[6] After briefing and argument on this issue, the trial court denied Christian's request to dismiss the venire pool.

To satisfy the first part of the prima facie test, the challenger must show that the excluded group is sufficiently numerous and distinct so that if it is systematically eliminated from jury panels, the Sixth Amendment's fair cross-section requirement cannot be satisfied. Duren, 439 U.S. at 364. Christian alleges that African Americans are unquestionably a distinctive group within the meaning of the Duren test. The State responds that it is not African Americans who are excluded, but felons, and excluding felons does not raise Sixth Amendment concerns.

We agree. Christian has failed to show a Sixth Amendment violation, because felons are the excluded group at issue, not African Americans. Felons cannot constitute a distinctive group in the community, as the exclusion of felons and accused felons from jury service has been upheld as constitutional. See United States v. Barry, 71 F.3d 1269, 1273-74 (7th Cir. 1995); United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993); United States v. Greene, 995 F.2d 793, 796 (8th Cir. 1993); United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979); United States v. Test, 550 F.2d 577, 594 (10th Cir. 1976); United States v. Best, 214 F. Supp. 2d 897, 905 (N.D. Ind. 2002). States may limit those eligible to serve on juries. Taylor, 419 U.S. at 527-28. Therefore, Christian's

[6] The burden then shifts to the State to justify the infringement by showing that attainment of a fair cross-section is incompatible with a significant state interest. Duren, 439 U.S. at 368. The State never had to make this showing, as the trial court ruled that Campbell had not presented a prima facie case of a violation.

evidence of the exclusion of felons cannot be, as a matter of law, sufficient evidence of the first Duren element, and we need not consider the second or third elements. His fair cross-section claim fails.

III. Jury Instructions for Assault by Battery

The State's proposed jury instruction defining assault read: "[a]n assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person." Christian objected, offering alternative arguments at the trial level and now on appeal. He first argues that no assault definition should have been given, following an observation in State v. Daniels that the "everyday understanding of 'assault' encompasses assault by actual battery." 87 Wn. App. 149, 156, 940 P.2d 690 (1997). Alternatively, Christian contends that the jury instruction defining assault (jury instruction 8), taken from 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, at 547 (2d ed. 1994) (WPIC), contains an error of law, because it fails to inform jurors that third degree assault by battery requires that the defendant intend *both* to do the act and that the act be harmful or offensive. Christian's proposed jury instructions included a "to convict" instruction that would have included the specific intent element that "the defendant intended for the touching or striking to be harmful or offensive."

The State responds that Christian's argument that assault by battery should include a specific intent element is unsupported by law. Citing State v.

Baker, the State argues that only the other two types of assault that do not constitute actual battery contain a specific intent element. 136 Wn. App 878, 883, 151 P.3d 237 (2007). We agree.

Washington recognizes three common law definitions of assault, in the absence of a definition from the legislature. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). These three types are: (1) an assault by placing another in reasonable apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm; (2) an attempt, with unlawful force, to inflict bodily injury upon another, accompanied by the apparent present ability to carry out the attempt; or (3) assault by battery. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). The Court in Byrd held that "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." Id. at 713. Notably, the Court's holding applied only to two of the three definitions of assault, and did not speak to whether specific intent was a required element of assault by battery—the third type of assault was not present in the case. See id. at 709-10, 712 n.3 (defining assault by battery in a footnote).

However, all three divisions of the Court of Appeals have held that that assault by battery does not require the State to show specific intent to cause harm. State v. Keend, 140 Wn. App. 858, 867, 166 P.3d 1268 (2007), rev. denied, 163 Wn.2d 1041, 187 P.3d 270 (2008) ("[a]ssault by battery simply requires intent to do the physical act constituting assault"); State v. Hall, 104

Wn. App. 56, 62, 14 P.3d 884 (2000), rev. denied, 143 Wn.2d 1023, 25 P.3d 1020 (2001) ("Assault by battery does not require specific intent to inflict harm or cause apprehension; rather, battery requires intent to do the physical act constituting assault"); Daniels, 87 Wn. App. at 155 ("Assault by battery . . . does not require specific intent to inflict substantial bodily harm or cause apprehension."). Further, WPIC 35.50 defines assault consistent with these cases.

A trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The jury was instructed that it had to find, beyond a reasonable doubt, the following elements:

> (1) That on or about [the] 15th day of September 2006 the defendant assaulted Daina Boggs;
> (2) That at the time of the assault Daina Boggs was a law enforcement officer . . . who was performing his or her official duties; and
> (3) That any of these acts occurred in the State of Washington.

The instruction defining assault read: "[a]n assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person."

The jury instruction given properly stated the law; the jury instruction requested by Christian did not. The trial court did not err in refusing to give Christian's proposed jury instruction.

IV. Exclusion of Lieutenant Hayes's Testimony

We review the trial court's interpretation of evidentiary rules de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). As long as the legal framework is correct, we review the trial court's decision to admit or exclude evidence for an abuse of discretion. Id.

During a pretrial hearing, Christian sought to admit the testimony of Seattle Police Department Lieutenant John Hayes under ER 404(a)(1) as to a pertinent trait of the character of the accused—specifically, Christian's actual relationship with the police through his service on the Disproportionality Committee of the Citizen's Task Force on Racial Profiling, and his lack of bias toward the police. The court stated that it would require the defense to put Lieutenant Hayes up for an offer of proof.

The offer of proof revealed that Lieutenant Hayes would have testified to the jury that he had approximately 30 interactions with Christian, many of which involved discussion of police-community relations. He would have also told the jury that he had never seen Christian behave as though he had animosity toward the police, nor had Christian expressed any in his presence. Christian asserted that the testimony was admissible both under ER 404(a)(1) and under a due process theory.

A. ER 404(a)(1) and ER 405(b)

The trial court excluded the testimony; in doing so, it relied on the interplay between ER 404(a)(1) and ER 405(b). The trial court reasoned:

> The question becomes whether the trait of character is an essential element of a charge[,] claim[,] or defense. . . .
> . . . The Defendant is not charged with having a general

> animosity toward police. . . . He is charged with basically overreacting to a situation in which he thought his daughter was in danger.

The trial court correctly synthesized ER 404(a)(1) and ER 405(b). Character evidence offered under ER 404(a) must be pertinent—meaning relevant—to rebut the nature of the charges against the defendant. City of Kennewick v. Day, 142 Wn.2d 1, 10, 11 P.3d 304 (2000) (explaining that "pertinent" in Rule 404 is synonymous with "relevant" as the term is defined in ER 401); see also 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 404.5, at 484-85 (5th 2007). The elements of assault by battery are an intentional touching or striking of another person that is harmful or offensive. Keend, 140 Wn. App. at 867; State v. Garcia, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978). Christian's view of the police is immaterial to whether he had formed the requisite intent to do the act that caused the harm.

The trial court based its ruling on a correct understanding of the law, and did not abuse its discretion in determining that Christian's positive view of the police was not relevant to rebutting an element of the assault with which he was charged.[7]

B. Due Process

After the court ruled that Lieutenant Hayes's testimony was inadmissible under ER 404(a)(1), Christian asserted that he should be able to advance the

[7] Because Campbell did not argue that Lieutenant Hayes's testimony was admissible under ER 401, ER 402, or ER 404(b) at trial, we do not consider the new theories of admissibility Campbell raises for the first time on appeal. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) ("A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.").

same testimony under a due process theory. He focuses on the importance of Lieutenant Hayes's testimony to his defense, claiming that the testimony was reliable and went directly to the central issue in the case—Christian's state of mind when he approached Officer Boggs, knowing that his daughter was being detained.

The right to offer the testimony of witnesses is a fundamental guarantee of due process, but the right is not absolute. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). In cases where defendants have been allowed to present otherwise inadmissible evidence, the evidence was highly exculpatory or crucial to the defense. See Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983).[8] Perry provides the test for determining whether exclusion of evidence amounts to a violation of due process, through balancing the importance of the evidence against the state interest in exclusion. A court must consider, inter alia, the probative value of the evidence on the central issue, its reliability, and

[8] Perry analyzes two Supreme Court cases that demonstrate the unusually compelling circumstances necessary to outweigh the State's interest. 713 F.2d at 1452. In Chambers v. Mississippi, the defendant wanted to introduce evidence that another person had confessed to the crime, but the trial court excluded it as hearsay. 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Because only the excluded testimony could tell Chambers's side of the story, and because the hearsay was trustworthy in this instance (it went against the declarant's penal interest), the Court found that exclusion of this evidence violated Chambers's due process rights. Id.

In Washington v. Texas, Washington was on trial for a murder in which Fuller participated, and Fuller had already been convicted for that same murder in a separate trial. 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The trial court excluded Fuller's testimony—that Washington had implored Fuller to leave the scene and then fled before Fuller fired the fatal shot—under an old Texas statute prohibiting a co-participant from testifying on behalf of the other participants. Id. The Court found that the State had only a weak interest in the statute, as it "prevent[ed] whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief." Id. at 22. For this reason, and because Fuller's testimony was vital to Washington's defense, the Court found that Washington was arbitrarily deprived of due process. Id. at 23.

whether it is the only evidence on the issue, versus the importance of the rule preventing its admission, how well the purpose applies, and how well the rule implements the purpose. Id. at 1452–53.

Whether he had a generally positive or neutral feeling toward police is not probative of the central issue—whether Christian committed assault by battery. In fact, his attitude toward the police is irrelevant to the determination of assault by battery. As we explained in our analysis of the jury instruction issue, assault by battery does not require specific intent to harm.

Further, while Lieutenant Hayes's testimony would undoubtedly help Christian, it was not the sole evidence on the issue. Christian testified that he had no animosity toward the officers when he approached, wanting only to introduce himself as A.C.'s father. He testified that he did not want to take matters into his own hands, because he knew it would be dangerous and counter to his goal to diffuse the situation.

Christian cannot show compelling circumstances commensurate with those described in Perry to warrant further consideration of his due process challenge. Exclusion of the testimony was not erroneous on due process grounds.

V. Prosecutorial Misconduct

We review trial court rulings on alleged prosecutorial misconduct for abuse of discretion. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A defendant claiming prosecutorial misconduct who has preserved the issue by

objection[9] "'bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

If the alleged misconduct does not implicate a constitutional right, comments will be deemed prejudicial only where there is a *substantial likelihood* the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)

If the alleged misconduct violates a constitutional right, as Christian contends, then "it is subject to the stricter standard of constitutional harmless error." State v. Traweek, 43 Wn. App. 99, 108, 715 P.2d 1148 (1986); see also State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error is only harmless if the appellate court is convinced, beyond a reasonable doubt, that the prosecutor's comment did not affect the verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Because constitutional error is presumed to be prejudicial, the State bears the burden of showing the error was harmless. Id.

In either instance, the prejudicial effect of each comment is determined by "placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'"

[9] Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), aff'd in part by, 119 Wn.2d 711, 837 P.2d 599 (1992). Campbell objected to both instances of alleged misconduct, so this distinct standard does not apply here.

McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561).

Christian takes issue with two comments by the prosecutor. First, during closing argument, the prosecutor discussed the versions of the event that the jury had heard:

> [The defendant testified] [t]hat he is kicked in his head some 20 times while people stand around and watch. Or does it make more sense that when he is tased he becomes compliant, he is quickly put into handcuffs, and this incident is over?
>
> And you have to -- to answer those questions you have to ask yourself why is it that only individuals who are closely associated with him see the stomping, the kicking, the hitting, and hear disparaging remarks? Why doesn't one unassociated member of the community say that they see that?

Christian claims that the prosecutor's comment shifted the burden to produce evidence to him, violating the strictures of the missing witness doctrine. The State responds that the comments were not improper at all. Rather, the prosecutor highlighted for the jury that the testimony of the witnesses who were neither officers nor associated with Christian contradicted Christian's story.

Under the missing witness doctrine, when "'evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, . . . he fails to do so,—the jury may draw an inference that it would be unfavorable to him.'" State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968)).

The prosecutor's comment did not implicate the rule. This court must analyze the comment in the context of the total argument and the evidence

addressed in the argument. McKenzie, 157 Wn.2d at 52. The prosecution mentioned the testimony of three witnesses, unassociated with Christian, who testified they had not seen any officers kick, stomp, or hit Christian. The prosecutor mentioned these witnesses and summarized their testimony, then continued to argue that Christian's version of the story was not credible. The context of the prosecutor's arguments demonstrates that she was not referring to any particular witness who the defense had failed to call—the touchstone of a missing witness doctrine analysis.

Further, counsel may also comment on a witness' veracity as long as he does not express it as a personal opinion and does not argue facts beyond the record. State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

The trial court did not abuse its discretion in overruling Christian's objection. No prosecutorial misconduct occurred, because the prosecutor's suggestion to the jury that testimony of witnesses unassociated with the defendant did not support his version of events did not constitute burden shifting, and was therefore not improper. A prosecutor's choice to contrast testimony to other testimony, when the prosecutor makes no reference to any particular missing witness, does not implicate the missing witness doctrine. Because Christian has not shown that the comment was improper, we do not discuss prejudice.

The second instance of alleged prosecutorial misconduct occurred when the prosecutor continued to attack the Christian's credibility by contending that if

Christian's testimony were true (that he was kicked and stomped upon repeatedly), he would have suffered more severe injury:

> If this man had been stomped on and kicked by the police officers that you saw or any police officer who's wearing boots, heavy boots, or bicycle shoes with cleats, you would have seen way more injury to Mr. Campbell [aka Christian]. He would not have been in the physical condition that he was in after this event. We would have heard about internal injuries.

Christian characterizes this portion of the prosecutor's argument as "arguing forensic facts . . . in the complete absence of any basis in the record." The State responds that the prosecutor's argument was a reasonable inference to draw from the evidence.

The trial court did not abuse its discretion in overruling Christian's objection. Counsel may argue facts in evidence and suggest reasonable inferences from that evidence; to do so is not misconduct. Smith, 104 Wn.2d at 510. Although the prosecutor should not have affirmatively stated that more injury would be present, but rather posed it as question to the jury, the prosecutor was nevertheless within the appropriate realm of inference. Because Christian has not shown that the comment was improper, we do not discuss prejudice.

VI. Comment on the Evidence

In response to Christian's objection to the prosecutor's argument concerning the level of injury Christian suffered, the trial court responded "Counsel, it is argument based on the evidence or reasonable inferences to be

drawn from it. Both parties are entitled to make such argument." Christian contends that the court's explanation constituted a comment on the evidence.

Section 16 of article IV of Washington's constitution prevents judges from commenting on the evidence presented at trial. This prevents the jury from influence by the judge. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990).

The court's comment did not reveal any attitude toward the merits of the case. The judge simply stated the bounds of permissible argument, and further mentioned that both parties were entitled to the same type of argument.

Moreover, the trial court instructed the jury on the impropriety of impermissible comments on the evidence, and mandated that the jury disregard any comment that it may have perceived as a comment.

We affirm.

WE CONCUR: